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267 NLRB No. 124

D--1088
Concord, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROB'S BODY AND PAINT SHOP, INC.

and

Case 32--CA--5067

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL--CIO, DISTRICT LODGE NO. 190; AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL--CIO, LOCAL LODGE NO. 1173

DECISION AND ORDER

Upon a charge filed on 26 November 1982 by International Association of Machinists and Aerospace Workers, AFL--CIO, District Lodge No. 190; and International Association of Machinists and Aerospace Workers, AFL--CIO, Local Lodge No. 1173, herein collectively called the Union, and duly served on Rob's Body and Paint Shop, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint and notice of hearing on 28 December 1982 and an amendment to complaint on 9 February 1983 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5), Section 8(d), and Section 2(6) and (7) of the National Labor Relations

Act, as amended. Copies of the charge, complaint and notice of hearing before an administrative law judge, and amendment to complaint were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint or to the amended complaint.

On 7 April 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with exhibits attached. Subsequently, on 14 April 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent failed to file a response to the Notice to Show Cause, and therefore the allegations in the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not

> specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent herein specifically states that unless an answer to the complaint is filed within 10 days of service thereof, ''all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.'' Further, counsel for the General Counsel advised Respondent, by letter dated 14 January 1983 that Respondent had failed to file an answer and that summary judgment would be sought unless an answer to the complaint was filed by 28 January 1983. Subsequently, counsel for the General Counsel advised Respondent, by letter dated 24 February 1983, that Respondent had failed to file an answer to the amendment to the complaint and that summary judgment would be sought unless an answer to the complaint, as amended, was filed by 3 March 1983. As noted above, Respondent has failed to file an answer to the complaint, as amended, and has failed to file a response to the Notice to Show Cause.

Accordingly, under the rule set forth above, no good cause having been shown for the failure to file a timely answer, the allegations of the complaint are deemed admitted and are found to be true, and we shall grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## Findings of Fact

### I. The Business of Respondent

Respondent is, and has been at all times material herein, a California corporation, with an office and place of business in Concord, California, where it is engaged in the auto body repair business. During the 12 months preceding issuance of the complaint, Respondent, in the course and conduct of its business operations, sold goods or services valued in excess of $50,000 to customers or business enterprises within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. The Labor Organizations Involved

International Association of Machinists and Aerospace Workers, AFL--CIO, District Lodge No. 190, and International Association of Machinists and Aerospace Workers, AFL--CIO, Local Lodge No. 1173, are labor organizations within the meaning of Section 2(5) of the Act.

### III. The Unfair Labor Practices

#### A. The 8(a)(1) and (3) Violations

On or about 15 September 1982, and continuing to on or about 11 October 1982, Respondent reduced the hourly wage rate paid to

its employee Miller. On or about 11 October 1982 Respondent discharged Miller, and since that date has failed and refused, and continues to fail and refuse, to reinstate him to his former position of employment. Respondent engaged in the aforesaid conduct because Miller joined or assisted the Union or engaged in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection. Commencing on or about 15 September 1982, and continuing to date, Respondent has imposed less desirable hours of work on its employees and reduced the time allowed for their coffeebreaks because they joined or assisted the Union or engaged in other protected concerted activities.

Accordingly, we find that, by the aforesaid conduct, Respondent discriminated in regard to the terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and that by such conduct Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

B. The 8(a)(1) and (5) and 8(d) Violations

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees of Respondent in the job classifications referred to in Sections 2, 3, and 26-32 of the collective bargaining agreement dated October 20, 1980, between Respondent and the Union, and entitled ''Independent Automotive Garages, Truck Shops and other Automotive Establishments Agreement''; Excluding office clerical employees, guards and supervisors as defined in the Act.

Since on or before 9 July 1975, and at all times material herein, the Union has been and is now the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above within the meaning of Section 9(a) of the Act, and since said date the Union has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective for the period 1 September 1980 to 31 August 1981 and has automatically been renewed on an annual basis since that date. The collective-bargaining agreement contains a grievance and arbitration provision which provides for the cost of arbitration to be divided equally between Respondent and the Union.

On various dates in or about mid-September 1982, Respondent, acting through its president, Honodel, at Respondent's premises, bypassed the Union and dealt directly with its employees in the unit by soliciting employees to enter into individual employment contracts as purported independent contractors. Commencing in or about mid-October 1982, and continuing until in or about December 1982, Respondent entered into individual employment contracts with persons performing unit work. Respondent engaged in such conduct without prior notice to the Union and without obtaining the consent of the Union to such conduct and without affording the Union an opportunity to negotiate and bargain as the exclusive bargaining representative of Respondent's unit employees with respect to such acts and conduct and the effects of such acts and conduct. Respondent engaged in such conduct

without complying with the requirements of Section 8(a)(5) and Section 8(d) of the Act. Commencing on or about 11 October 1982, and continuing to date, Respondent has refused, and continues to refuse, to process the grievance of employee Miller in the manner provided in the collective-bargaining agreement referred to above.

Accordingly, we find that, by the aforesaid conduct, Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the Union as the exclusive bargaining representative of the employees in the appropriate unit and that, by such conduct, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3), and (5) and Section 8(d) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices and to effectuate the policies of the Act.

Having found that Respondent discriminatorily reduced the wage rate of and subsequently discharged employee Floyd Graham Miller, we shall order Respondent to offer Miller immediate and full reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. We also shall order that Respondent make Miller whole for any loss of earnings he may have suffered because of the unlawful reduction of his wage rate with interest thereon as set forth in Florida Steel Corporation, 231 NLRB 651 (1977),[1] and that Respondent make Miller whole for any loss of earnings he may have suffered due to his unlawful discharge, to be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest as set forth in Florida Steel, supra. We also shall order that Respondent expunge from its files any reference to the unlawful discharge of Miller on or about 11 October 1982, and notify him that this has been done and that evidence of Respondent's unlawful conduct will not be used as a basis for future personnel actions against him.

Additionally, we shall order Respondent to revoke and cease giving effect to the individual employment contracts entered into with persons performing unit work, to offer immediate and full reinstatement to the unit employees to their former jobs or, if

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[1] See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and to make whole such employees for their losses, if any, due to Respondent's unlawful entering into such contracts, with interest thereon to be computed in the manner prescribed in Florida Steel, supra. Finally, we shall require Respondent to honor its collective-bargaining agreement with the Union, including processing the grievance of Floyd Graham Miller in the manner provided in that agreement, and otherwise bargain collectively with the Union as the exclusive bargaining representative of the unit employees, in compliance with the requirements of Section 8(a)(5) and Section 8(d) of the Act.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Rob's Body and Paint Shop, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL--CIO, District Lodge No. 190; and International Association of Machinists and Aerospace Workers, AFL--CIO, Local Lodge No. 1173, are labor organizations within the meaning of Section 2(5) of the Act.

3. All employees of Respondent in the job classifications referred to in sections 2, 3, and 26-32 of the collective bargaining agreement dated 20 October 1980, between Respondent

and the Union, and entitled ''Independent Automotive Garages, Truck Shops and other Automotive Establishments Agreements''; excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. Since on or about 9 July 1975 the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By the acts described in section III, A, above, Respondent has discriminated in regard to the hire and tenure of employment of its employees, thereby discouraging membership in or activities on behalf of a labor organization, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By the acts described in section III, B, above, Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the above-named labor organization as the exclusive bargaining representative of all of the employees in the appropriate bargaining unit described above, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rob's Body and Paint Shop, Inc., Concord, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or otherwise discriminating against them in any manner with respect to their tenure of employment or any term or condition of employment because of their membership in, support of, or activities on behalf of International Association of Machinists and Aerospace Workers, AFL--CIO, District Lodge No. 190; and International Association of Machinists and Aerospace Workers, AFL--CIO, Local Lodge No. 1173, or any other labor organization.

(b) Discouraging membership in the above-named labor organizations, or any other labor organization, by reducing the hourly wage rate paid to its employees by imposing less desirable hours of work on its employees, and by reducing the time allowed for taking coffeebreaks.

(c) Refusing to bargain collectively with International Association of Machinists and Aerospace Workers, AFL--CIO, District Lodge No. 190; and International Association of Machinists and Aerospace Workers, AFL--CIO, Local Lodge No. 1173, by dealing directly with its unit employees and soliciting the employees to enter into individual employment contracts as purported independent contractors, and by entering into individual employment contracts with persons performing unit

work, thereby bypassing the Union as the employees' exclusive collective-bargaining representative. The appropriate unit is:

> All employees of Respondent in the job classifications referred to in Sections 2, 3, and 26-32 of the collective bargaining agreement dated October 20, 1980, between Respondent and the Union, and entitled, ''Independent Automotive Garages, Truck Shops and other Automotive Establishments Agreement''; Excluding office clerical employees, guards and supervisors as defined in the Act.

(d) Refusing to process the grievance of Floyd Graham Miller in the manner provided in the collective-bargaining agreement between Respondent and the Union, or otherwise by refusing to honor the terms and provisions of said agreement, without complying with the requirements of Section 8(a) (5) and Section 8(d) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to employee Floyd Graham Miller to his former job or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any losses he may have suffered by reason of the discrimination against him as set forth in the section of this Decision entitled ''The Remedy.''

(b) Expunge from its files any reference to the unlawful discharge of Floyd Graham Miller on or about 11 October 1982 and notify him in writing that this has been done and that evidence of Respondent's unlawful conduct will not be used as a basis for future personnel actions against him.

(c) Revoke and cease giving effect to the individual employment contracts entered into by Respondent with persons performing unit work, offer immediate and full reinstatement to the unit employees to their former jobs, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make whole such employees for their losses, if any, due to the unlawful entering into such contracts as set forth in the section of this Decision entitled ''The Remedy.''

(d) Honor the terms and conditions of the collective-bargaining agreement with the Union, including processing the grievance of Floyd Graham Miller in the manner provided in that agreement, and otherwise bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the above-described appropriate unit, in compliance with the requirements of Section 8(a)(5) and Section 8(d) of the Act.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay which may be due under the terms of this Order.

(f) Post at its Concord, California, facility copies of the attached notice marked ''Appendix.''[2] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. 15 September 1983

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Donald L. Dotson, Chairman

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Don A. Zimmerman, Member

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Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge employees or otherwise discriminate in any manner in respect to their tenure of employment or any term or condition of employment because of their membership in, support of, or activities on behalf of International Association of Machinists and Aerospace Workers, AFL--CIO, District Lodge No. 190; and International Association of Machinists and Aerospace Workers, AFL--CIO, Local Lodge No. 1173, or any other labor organization.

WE WILL NOT discourage membership in the aforementioned Union, or any other labor organization, by reducing the hourly wage rate paid to our employees, by imposing less desirable hours of work on our employees, and by reducing the time allowed our employees for coffeebreaks.

WE WILL NOT refuse to bargain with the above-named Union by dealing directly with the unit employees and soliciting them to enter into individual employment contracts as purported independent contractors, and by entering into individual employment contracts with persons performing unit work, thereby bypassing the Union as the employees' exclusive bargaining representative. The appropriate unit is:

> All employees of Rob's Body and Paint Shop, Inc., in the job classifications referred to in Sections 2, 3, and 26-32 of the collective bargaining agreement dated October 20, 1980, between Rob's Body and Paint Shop, Inc., and International Association of Machinists and Aerospace Workers, AFL--CIO, District Lodge No. 190; and International Association of Machinists and Aerospace Workers, AFL--CIO, Local Lodge No. 1173, and entitled, ''Independent Automotive Garages, Truck Shops and other Automotive Establishments Agreement''; Excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer to Floyd Graham Miller immediate and full reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority

or other rights and privileges previously enjoyed; and WE WILL make him whole for losses he may have suffered by reason of the discrimination against him, with interest.

WE WILL expunge from our files any reference to the discharge of Floyd Graham Miller on 11 October 1982 and WE WILL notify him that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him.

WE WILL revoke and cease giving effect to the individual employment contracts we entered into with persons performing unit work; WE WILL offer immediate and full reinstatement to the unit employees to their former jobs, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed; and WE WILL make whole the unit employees for their losses, if any, due to our unlawful entering into such contracts, with interest.

WE WILL honor the terms and conditions of our collective-bargaining agreement with the Union, incuding processing the grievance of Floyd Graham Miller in the manner provided in that agreement; and WE WILL otherwise bargain collectively with the Union as the exclusive bargaining representative of the employees in the above-described unit, in compliance with the requirements of Section 8(a)(5) and Section 8(d) of the National Labor Relations Act.

ROB'S BODY AND PAINT SHOP, INC.

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(Employer)

Dated ---------- By ----------

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Breuner Building, 2d Floor, 2201 Broadway, P.O. Box 12983, Oakland, California 94604, Telephone 415--273--6122.